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No. 76-278

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM B. JOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. 3a) is reported at 538 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1976, and a petition for rehearing was denied on July 26, 1976 (Pet. App. 4a). The petition for a writ of certiorari was filed on August 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether petitioner's indictment was fatally defective.

3. Whether pre-indictment delay denied petitioner due process of law.

4. Whether government counsel's inquiry regarding future employment of petitioner's attorney during an out-of-court conversation deprived petitioner of a fair trial.

5. Whether 18 U.S.C. 1001 is unconstitutional as applied in this case.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of knowingly using a false personal financial statement in a matter within the jurisdiction of the Department of Housing and Urban Development, in violation of 18 U.S.C. 1001. He was sentenced to three years' imprisonment, all but four months of which was suspended in favor of probation for two years and eight months. The court of appeals affirmed (Pet. App. 3a).

The evidence at trial showed that in 1971 petitioner was the Director of the Insuring Office of the Department of

Housing and Urban Development in Cincinnati, Ohio (Tr. 219). In the fall of 1971, petitioner's son-in-law, Gerald McClanahan, after discussions with petitioner, purchased an apartment building owned by H.U.D. for $1,000 (Tr. 25-27, 47, 53).[1] On December 1, 1971, McClanahan submitted an application for project mortgage insurance on the apartment complex, but his application was denied by H.U.D.'s Federal Housing Administration because his personal financial and credit statement listed no assets (Tr. 28-29, 50). McClanahan informed petitioner that he would have to show assets if he was to be approved as a sponsor for the project (Tr. 29-30). Petitioner then arranged a meeting between himself, McClanahan, and Thomas Tudor, who was an employee of the Leader Mortgage Company and was in charge of the company's H.U.D. division (Tr. 109, 111, 115). At petitioner's urging, a $5,000 loan from the mortgage company to McClanahan was arranged so that McClanahan could list the assets on his personal financial and credit statement (Tr. 30-33, 56, 115-117).

On January 20, 1972, the $5,000 check from Leader to McClanahan was deposited in a bank (Tr. 120). On that day, McClanahan withdrew $459.90 from the account to pay the F.H.A. application fee. The $4,540.10 remaining in the account was used on McClanahan's second financial statement to show that he had substantial cash assets (Tr. 35, 51, 104). This financial statement fraudulently failed to reflect any liabilities or debts owed by McClanahan, as required by law (Tr. 52-53; Govt. Ex. 1D). Petitioner not only was aware of this requirement and of the falsity of the

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[1] McClanahan was indicted with petitioner, but his case was subsequently severed.

financial statement but he also notified McClanahan of the procedures that H.U.D. would use to verify the financial statement (Tr. 35-36).

After submission of the false statement, the H.U.D. Mortgage Credit Department was still dissatisfied with McClanahan's finances and recommended that the project be declined (Tr. 143, 149, 193). Since the project could not go forward without petitioner's approval, the recommendation was brought to his attention (Tr. 172-175). On February 2, 1972, petitioner instructed the Mortgage Credit Department that the project was a small one which McClanahan could handle and that if evidence could be obtained to show that the money reflected on McClanahan's financial statement was actually in the bank, the project should be approved (Tr. 193-195). Petitioner made a note to this effect on the bottom of the Mortgage Credit Department's rejection memo (Tr. 194; Govt. Ex. 3B). On February 7, 1972, after the bank had verified McClanahan's assets, the project was approved and F.H.A. committed itself to a $153,000 loan (Tr. 196-197; Govt. Ex. 2B). Thereafter, on April 5, 1972, the same day as the closing on the project, the $4,582.86 balance in McClanahan's account was withdrawn and paid to the mortgage company.

ARGUMENT

1. Petitioner contends (Pet. 5) that the evidence was insufficient to support his conviction. But the evidence outlined above provided an ample basis for the jury to find that petitioner knew that McClanahan's financial statement had falsely omitted the loan from the mortgage company as a liability and that petitioner had used the financial statement to secure a loan from H.U.D. for his son-in-law. See *McClanahan* v. *United States*, 230 F. 2d 919 (C.A. 5), certiorari denied, 352 U.S. 824.

2. Petitioner contends (Pet. 3) that his indictment was fatally defective because it failed to contain an allegation of deceitfulness or intent to commit fraud. The indictment, however, expressly charged petitioner with willfully and knowingly using a document containing a materially false, fictitious, and fraudulent statement in connection with the approval by him, in his official capacity, of a H.U.D. rehabilitation project. This set forth each of the elements of the offense. Furthermore, a reading of the indictment for its clear meaning reveals that it adequately placed petitioner on notice of the charges against him, allowed him to prepare a defense, and apprised him "with accuracy to what extent he may plead a former acquittal or conviction." *Hagner* v. *United States*, 285 U.S. 427, 431.

3. Petitioner claims (Pet. 4) that his rights were violated by pre-indictment delay. This argument is couched in conclusory terms, and petitioner has neither identified prejudice from the delay nor alleged facts showing that the delay was designed to secure a tactical advantage by the government. Indeed, petitioner does not even discuss the chronology of events leading up to his indictment. He has therefore failed to demonstrate that the delay in this case violated due process of law. *United States* v. *Marion*, 404 U.S. 307.

4. Petitioner contends (Pet. 4) that he was denied a fair trial because government counsel, during a recess in the trial, asked petitioner's attorney to consider working in the United States Attorney's Office in the future. Petitioner has not alleged that this statement, which occurred outside the hearing of the judge and jury, led to the ineffective assistance of counsel or in any way affected the outcome of the trial. In these circumstances, petitioner was not prejudiced by the remark.

5. Without elaboration, petitioner claims (Pet. 5) that 18 U.S.C. 1001 is unconstitutional and that this case represents a "truly novel interpretation" of the statute. Assuming that petitioner's argument here is the same as that presented in the court of appeals—*i.e.*, that Section 1001 is unconstitutionally vague and indefinite—it is insubstantial. The statute clearly prohibits the knowing use of a false, fraudulent or fictitious document in any matter within the jurisdiction of a department or agency of the United States. As the lower courts correctly found, this language gives fair warning to a person of ordinary intelligence as to what is prohibited. Furthermore, the requirement of a knowing and willful violation prevents the possibility of punishing purely innocent conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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